SUPREME COURT, U. S

MAY 9 1975

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

NO. 74-1412

PRO ARTS, INC.

Petitioner

vs.

ROBERT L. BELL

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SIXTH CIRCUIT
FOR VACATION OF JUDGMENT BELOW

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR VACATION OF JUDGMENT BELOW

The petitioner, Pro Arts, Inc., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on February 14, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals appears at Appendix A, infra, pp. 7 to 10 and is unreported.

The opinion of the United States District Court appears at Appendix B, infra, pp. 10 to 46 and is reported at 366 F. suppl. 474.

JURISDICTION

The order of the United States Court of Appeals was entered on February 14, 1975, See Appendix A. The petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of the Court is invoked under 28 U.S.C., § 1254.

QUESTIONS PRESENTED

The action is based upon a copyright infringement. The questions thereby arising are:

1. Whether the poem in question had been used in so many different forms that it was dedicated to public use. The book of poems introduced by the plaintiff discusses the confusion and the defendant had reason to believe the poem was not protected by a copyright.

2. Were damages ascertainable based upon the

Pro Arts' records. All transactions in regard to Desiderata posters were submitted into the record; and, the plaintiff had ample time prior to the trial to verify the validity of these sales.

If the logic of the Court in assessing damages is followed, actual damages could never be determined because the infringer is perpetuating a misconception. The Court abused its discretion by imposing damages beyond the records admitted. The alleged infringement resulted in little profit to Pro Arts; but, the Court magnified the damage to the point where it was punitive in nature though saying in its opinion that punitive damages were not necessitated in the case.

STATUTE INVOLVED

Section 101 (b) of the Copyright Act. (17 U.S.C.A. Copyrights) provides in part that an infringer shall be liable "to pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement as well as the profits which

the infringer shall have made from the infringement."

STATEMENT OF FACTS

The defendant, Pro Arts, Inc., was an Ohio Corporation engaged in the business of making and selling posters. Plaintiff, Robert L. Bell, obtained the publishing right to the Poems of Max Ehrmann which included Desiderata. In the normal course of business Pro Arts, Inc., acquired some posters with the poem, Desiderata printed on them. Some of these posters were allegedly printed American Newsrepeat Co. which was not authorized by the plaintiff. Other posters bore no indication of who printed them.

Although Pro Arts, Inc., was contacted by Mr. Bell, it was for the purpose of determining who was printing the poster, and Pro Arts, Inc., cooperated in making this information available.

During the course of the trial, Mr. Bell admitted that numerous licenses were issued to companies to print the poem Desiderata and he didn't know the names of the companies so licensed. He also admitted that

the licenses were obtained for a relatively small amount, or a few cents, per poster. Mr. Bell then testified that his damages were $1,650.00 which represented $.50¢ for each poster sold by Pro Arts, Inc. This amount was far in excess of the profits of Pro Arts, Inc., or the standard charge for using the poem. The Trial Court then determined excessive damages based on the perpetuating of the myth which has received national publicity while Pro Arts, Inc., only distributed 3,300 posters.

REASONS FOR GRANTING THE WRIT

1. The poem in question was dedicated to the public. The confusion, which is admitted in the Poems of Max Ehrmann, was promoted on national television and in a syndicated column, so it is not difficult to see why Pro Arts, Inc., was uncertain as to what action to take immediately. It was the understanding of Mr. Trikilis that he was dealing with material which was available for public use. In the Case of Stuff v. E. C. Publications 342 F.2d 143 (1965) the doctrine of

dedication is set forth which should apply to this case.

II. The damages assessed were excessive. There is no theory set forth in the federal law which enables the Trial Court to speculate on damages where actual damage can be established. The complete records of Pro Arts., Inc., were made available to the Court, and damages were ascertainable if any existed according to the profits of the defendant or the damage to the plaintiff.

CONCLUSION

For these reasons a Writ of Certiorari should issue to reverse the judgment and opinion of the United States Court of Appeals for the Sixth District.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT L. BELL, et al.	)	
	)	
Plaintiffs-Appellees	)	
vs.	)	
	)	NO. 74 1232
	)	
PRO ARTS, INC., et al.	)	
	)	
Defendants-Appellants	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Decided and Filed February 14, 1975

Before: Phillips, Chief Judge; Miller, Circuit Judge; *DeMascio, District Judge.

Per Curiam: Plaintiff-appellee Bell discovered quite by chance that defendant-appellant was distributing unauthorized renditions of the poem DESIDERATA without displaying an appropriate copyright legend. He formally advised appellant of his copyright and

* The Honorable Robert E. DeMascio, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

demanded that the appellant cease and desist from future sales of the poem. When this and several additional demands failed to deter the appellant, plaintiff filed this copyright infringement action for injunctive and monetary relief. The cause was tried before the United States District Court for the Northern District of Ohio without a jury. That court found appellee's copyright valid and infringed in several respects. There were two representations of the poem incorporated in appellant's catalogue. One included the entire text on a white background falsely representing that it was "found in Old St. Paul's Church, Baltimore, 1692." The second contained the text superimposed on a beach scene. Neither of these representations contained the copyright legend. The district court awarded appellee damages of $5,000 as well as permanent injunctive relief. On the basis of Chief Judge Frank J. Battisti's exhaustive and well-reasoned opinion, reported at 366 F.Supp. 474, we affirm.

Appellants contend in this appeal that the trial court erred in permitting the introduction of

unauthenticated evidence; in allowing the introduction of hearsay statements; in imposing damages; and in exhibiting prejudice toward appellants during the trial. We find these contentions lack merit. Appellants have not supported the allegation that the trial court received documentary evidence not properly authenticated, nor has it shown that Exhibits 6 and 10, also alleged to be unauthenticated, were relied upon by the court in its findings of infringement. Notwithstanding this failure, the parties were afforded ample opportunity to assert a valid objection to authenticity. Appellant made no such objection. Similarly hearsay statements were not considered by the court except to permit appellee to identify the president of appellant company and his address (finding No. 19). Even assuming these statements constituted hearsay, they were not offered to prove a critical trial issue and, therefore, their admission was harmless. It is apparent that appellant's damages were not readily ascertainable. The failure of appellant to co-operate during pretrial discovery made it impossible to ascertain damages.

Where actual damages are unascertainable, the court may award damages within the limits prescribed by 17 U.S.C. § 101. The award by the district court here did not exceed those limits.

Finally, we have reviewed this record and find that the judgment was amply supported by substantial evidence and that the appellant's bare allegation that the trial court was prejudiced is without merit.

Judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT L. BELL dba Crescendo Publishers, et al.,	)	
Plaintiffs	)	NO. C 71 661
v.	)	
PRO ARTS, INC., et al.,	)	MEMORANDUM OPINION AND ORDER
Defendants	)	

Battisti, C.J.

This is an action seeking injunctive relief and damages pursuant to 17 USC § 101 for alleged copyright infringements. The case came on for trial before this Court on August 13, 1973, jury having been waived by the parties. In accordance with Rule 52 (a), F.R. Civ. P., the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. The Parties

1. Plaintiff Bell, dba Crescendo Publishers, is a citizen of Massachusetts, having his principal place of business in the City of Boston. He is engaged in the business of book publishing.

2. Plaintiff Cuarta Corporation, dba Crescendo Publishing Company, is a Massachusetts corporation, having its principal place of business in the City of Boston. It is engaged in the business of publishing music, text and trade books, and literary works.

3. Defendant Pro Arts, Inc. (hereinafter Pro Arts) is an Ohio corporation, incorporated in 1969, and originally having its principal place of business in Kent, Ohio. Pro Arts is now situated in Medina, Ohio. Defendants estimated the gross revenues of Pro Arts to have been $350,000. in 1969; $550,000. in 1970; $700,000. in 1971; $1,000,000. in 1972; and $1,200,000. in 1973. In 1973, approximately half of the gross revenues of Pro Arts resulted from the sale or exchange of approximately 1,500,000 posters.

4. Defendants Michael P. Trikilis (hereinafter M. Trikilis) and Theodore N. Trikilis (hereinafter T. Trikilis) are, respectively, the president and vice-president of Pro Arts, each owning forty percent of the stock of the corporation. M. Trikilis has been, and is, generally in charge of productions and operations; and T. Trikilis has been, and is, generally in charge of sales and new product development.

B. DESIDERATA

5. DESIDERATA is a prose poem, the full text of which, as published by plaintiff Cuarta Corporation, with distinctive printing and spacing figures and

bearing copyright notice, "(c) 1927 Max Ehrmann, (c) Renewed 1954, Bertha Ehrmann, Crescendo Publishing Company, Boston 02116," is plaintiffs' Exhibit 1. DESIDERATA was written by Max Ehrmann. It was first published by Mr. Ehrmann, dba Indiana Publishing Company, on January 3, 1927, in Terre Haute, Indiana, and was first copyrighted January 6, 1927, under copyright registration #A962402 (PX-2A and PX-26). This copyright was renewed February 25, 1954, by Bertha K. Ehrmann, widow of Max Ehrmann, under renewal registration #R 127188 (PX-2B, PX-27). Later DESIDERATA was included in a book entitled, Poems of Max Ehrmann, published November 22, 1948, by Bruce Humphries, Inc., of Boston under a contract and assignment dated March 4, 1948 (PX-3A) by and from Bertha K. Ehrmann, with and to Bruce Humphries, Inc., under copyright registration #A 28266, as obtained December 13, 1948, by Bertha K. Ehrmann for her assignee, Bruce Humphries, Inc. (PX-3B, PX-28).

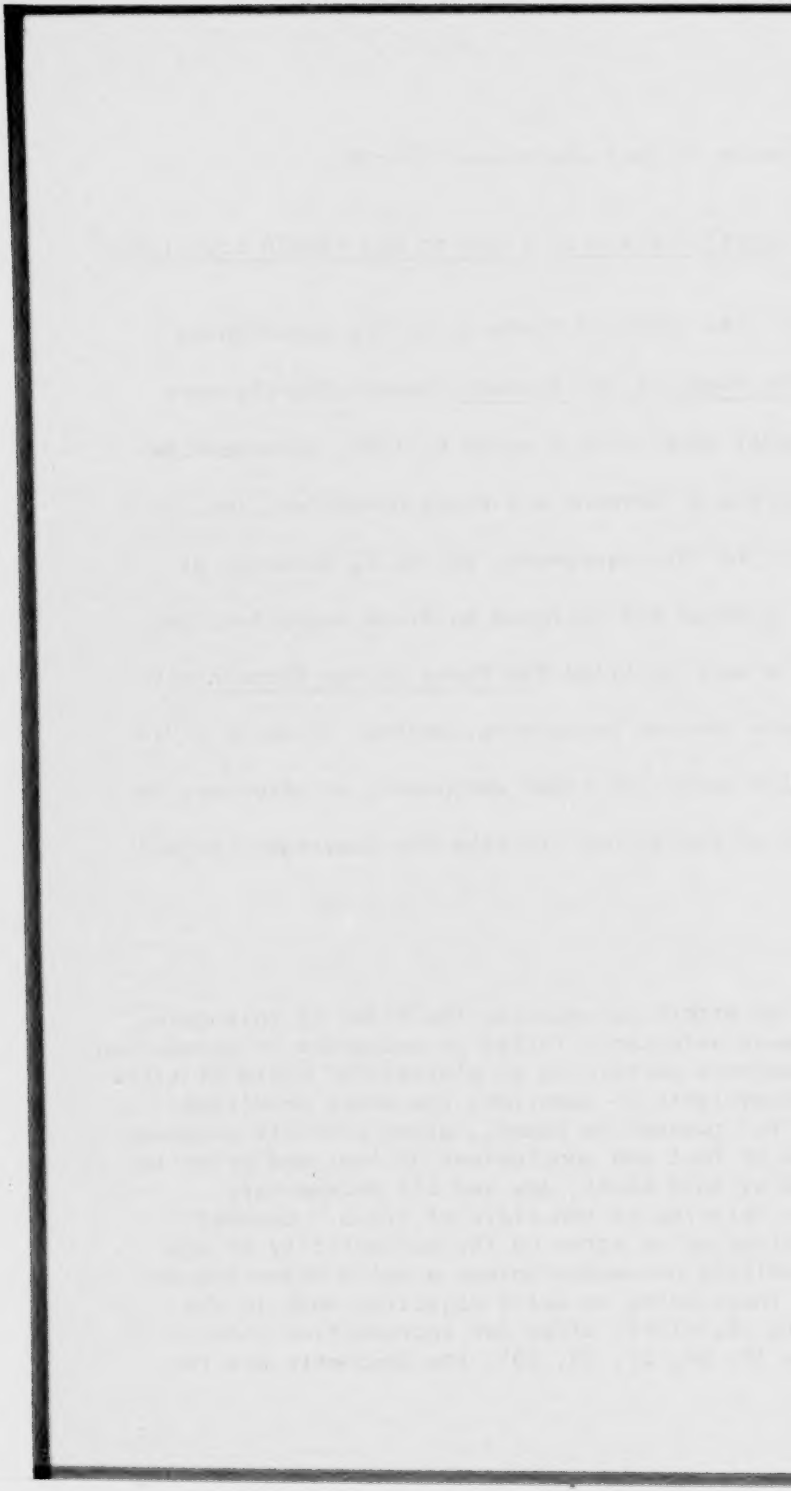
6. There is a myth that DESIDERATA was"found in Old Saint Paul's Church, dated 1692." This myth

has no basis in fact whatsoever (PX-3G).

C. Plaintiffs' Claim of Title to DESIDERATA copyrights[1]

7. The claim of title as to the copyrighted book, The Poems of Max Ehrmann (containing the work DESIDERATA) began with a March 4, 1948, agreement between Bertha K. Ehrmann and Bruce Humphries, Inc. (PX-3A). In this agreement, Bertha K. Ehrmann, as author, granted and assigned to Bruce Humphries, Inc. " . . . a work entitled The Poems of Max Ehrmann with all rights thereto pertaining, whether in whole or in part, with exclusive right and power, as attorney, in the name of the author, to take out copyright thereof,

1) In an effort to expedite the trial of this case, and because defendants failed to cooperate in connection with discovery pertaining to plaintiffs' claim of title to the copyrights in question, the Court permitted plaintiffs' counsel to submit, along with his proposed findings of fact and conclusions of law, and prior to decision by this Court, any and all documentary evidence relating to the claim of title. Counsel were instructed to agree on the authenticity of any such submitted documents unless a valid objection existed. There being no valid objection made to the documents plaintiffs offer for introduction into evidence (PX 26, 27, 28, 29), the documents are received.



and to hold and enjoy said copyright and renewal, and publish said work, in whole or in part,during the term or terms thereof, in all countries and in all languages." Bruce Humphries, Inc., also obtained the right to sell subsidiary publishing rights to the book.

8. On November 22, 1948, a book entitled The Poems of Max Ehrmann (containing DESIDERATA) was published by Bruce Humphries, Inc. On December 13, 1948, copyright registration for that book, #A28266 (PX-3B, PX-28) was issued by the Copyright Office in the name of Bertha K. Ehrmann, with the certificate being sent to her assignee, Bruce Humphries, Inc., in Boston.

9. Thereafter, on May 9, 1960, Bruce Humphries, Inc., was purchased by Reliance Corporation and was operated as Bruce Humphries-Division of Reliance Corporation (PX-3C). On October 24, 1967, R. R. Larsen and Co., Inc., later purchased at a lien sale all assets of Bruce Humphries-Division of Reliance Corporation, consisting of the " . . . name, tradename, goodwill, accounts receivable, copyrights, inventory office equipment, printing plates and customer lists . . ." of Bruce Humphries-Division of Reliance

Corporation, then being operated personally by plaintiff Bell as president (PX-3D).

10. On September 30, 1968, plaintiff Bell purchased from R. R. Larsen and Co., Inc., dba Bruce Humphries Publishers, all rights previously acquired by Bruce Humphries Publishers with respect to "The Poems of Max Ehrmann by Max Ehrmann" and other literary works (PX-3E).

11. Thereafter, on January 16, 1962, Bertha K. Ehrmann died in Terre Haute, Indiana. Her will (PX-29) was admitted to probate in Vigo (County, Indiana) Circuit Court under Estate #24188. By this will, Bertha K. Ehrmann left her entire net estate to her nephew, Richmond Wight. Her net estate consisted of specified personal property, literary rights relative to the writings of her late husband Max Ehrmann, and a trust established for the sole benefit of her same nephew, Richmond Wight, after payment of debts and expenses.

The provision as to the bequest of Bertha K.

Ehrmann to her nephew, of rights to the writings of Max Ehrmann, appears in Item III of her will:

> "ITEM III
>
> " * * *
>
> "I further bequeath to my nephew, Richmond Wight, all my right, title and interest in and to all royalties and income from the writings, poems and plays of Max Ehrmann, including royalties from individual plays."

12. Thereafter, on May 14, 1971, Richmond Wight, nephew of Bertha K. Ehrmann, deceased, made two assignments to plaintiff Bell (PX-2C and PX-3F).

13. On May 14, 1971, with respect to the single literary work, DESIDERATA, Richmond Wight, in plaintiffs' Exhibit 2C, after reciting the facts previously found herein in Findings 5 and 11, assigned to plaintiff Bell:

> " . . . all of Assignor's (Richmond Wight's) right, title and interest in and to Poem (DESIDERATA) and the copyright and renewal copyright covering Poem (DESIDERATA) and all other rights pursuant thereto, such as Assignor (Richmond Wight) may possess" (PX-2C)

This assignment was recorded in the Copyright Office June 23, 1971, Volume 1419, pp. 219-220.

14. Also on May 14, 1971, with respect to the book of collected poetry written by Max Ehrmann, entitled The Poems of Max Ehrmann and including therein DESIDERATA, Richmond Wight, after reciting the facts previously found herein in Findings 9 and 11, assigned to plaintiff Bell:

> " . . . all of Assignor's (Richmond Wight's) right, title and interest in and to Book (The Poems of Max Ehrmann) and the copyright, copyright registration and right to renew the copyright registration covering Book (The Poems of Max Ehrmann) and all other rights pursuant thereto such as Assignor (Richmond Wight) may possess." (PX-3F)

This assignment was recorded in the Copyright Office June 23, 1971, Volume 1419, pp. 217-218.

15. On February 1, 1972, plaintiff Bell assigned to plaintiff Cuarta all of Bell's publishing rights to the book entitled The Poems of Max Ehrmann (including DESIDERATA) under copyright registration #A28266 (PX-3B) and under an assignment to plaintiff Bell, of residual publishing rights to that book from Richmond Wight as found in Finding 14 above. This assignment from plaintiff Bell to plaintiff Cuarta was

recorded in the Copyright Office April 17, 1972, Volume 1446, pp. 213-215 (PX-4).

D. Pro Arts Utilization of DESIDERATA, Without Notice of Copyright, Before and After Written Notice to Cease and Desist

16. Plaintiffs' Exhibit 6 is a full-size black and white poster bearing the caption DESIDERATA in large type. It depicts a placid beach or water scene. On the bottom portion of that poster the full text of DESIDERATA is printed in distinctive type with the first three lines in full capitals and with distinctive spacing figures inserted between certain sentences, with two such spacing figures inserted at the end of the text, in the same manner and way as appear on copies of DESIDERATA as legally published by Crescendo Publishing Company (PX01). Exhibit PX-6 bears no notice of copyright with respect to the DESIDERATA portion thereof. It does bear the unexplained notation "(c) 1968 AMERICAN NEWSREPEAT CO., 243 Collins St., San Francisco, Calif. 94118." Upon inquiry directed to that address January 7, 1969,

plaintiff Bell was informed as of January 28, 1969, that American Newsrepeat Company had gone out of existence in May 1968 (PX-8 and PX-9). Plaintiff Bell was thereafter unable to trace American Newsrepeat Company.

17. The Pro Arts 1970 catalog (PX-21), as distributed by Pro Arts to customers and prospective customers requesting same, included code numbered pictures of approximately 175 different poster designs, including No. OC27 DESIDERATA and No. OC38 DESIDERATA (picture). An undated Pro Arts advertising flyer (PX-20), utilized by Pro Arts in unknown quantities and during unknown periods of time, depicts, for sale, five selected color litho posters and eight selected black and white posters, included No. OC37 DESIDERATA. Each of the No. OC27 DESIDERATA items depicted in PX-20 and PX-21 at the bottom of the poster contains the words, "Found in Old Saint Paul's Church; dated 1692." The No. OC38 DESIDERATA (picture), depicted in the 1970 Pro Arts catalog, shows no bottom margin and thus shows no space wherein a notice of copyright

could be inserted. No copyright notice of any kind appears in either the 1970 Pro Arts catalog or in the undated Pro Arts advertising flyer with respect to any of the DESIDERATA items depicted for sale therein.

18. With respect to Item No. OC28 (DESIDERATA) (picture), as offered for sale in the 1970 Pro Arts catalog, the Court has noted the identity of the placid beach or water scene and text of DESIDERATA DEPICTED IN PX-6 (See Finding 17). The Court has also noted that Pro Arts, in its depictions of DESIDERATA, in both the Pro Arts 1970 catalog (PX-21) and in the Pro Arts advertising flyer (PX-20) has used a type face; a technique of capitalizing portions of the text of DESIDERATA: and an arrangement of spacing figures, which are identical with those used by plaintiffs in their publication of their copyrighted representations of DESIDERATA (PX-1)

19. During the Boston Gift Show, held September 20-24, 1970, plaintiff Bell noted that a poster containing the full text of DESIDERATA and a pictorial

representation of a placid beach or water scene (similar both to the placid beach or water scene with the full text of DESIDERATA included, shown in PX-6 and in Pro Arts 1970 catalog Item No. OC38) was being displayed and offered for sale in Room 206 of that show. The program for the 1970 Boston Gift Show listed Pro Arts, Inc., P.O. Box 287, Kent, Ohio 44240, telephone (216) 296-4922, as the Exhibitor in Room 206. Plaintiff Bell talked to the person in charge of Room 206, one Joseph Malone, advised Malone of Bell's ownership of copyright rights regarding DESIDERATA and demanded that the poster containing the placid beach or water scene and the full text of DESIDERATA be removed. It was removed. Upon inquiry, Malone informed Bell that the president of Pro Arts was Mike Trikilis. Bell made contemporaneous hand-written notes regarding this information and the Kent and Medina addresses of Pro Arts on page 238 of the 1970 Boston Gift Show Program (PX-5).

20. On September 25, 1970, Bell forwarded by certified mail #364126, return receipt requested, a letter addressed to Pro Arts Company, Box 287, Kent, Ohio 44240, referring to his conversation with Joseph

Malone at the Boston Gift Show and demanding that Pro Arts " . . . cease and desist all sales of DESIDERATA in any form whatsoever . . ." not bearing a proper copyright notice. Bell also demanded:

> "In addition, you are to furnish us with the names and addresses of all manufacturers from whom you have purchased DESIDERATA together with the number of posters purchased and the list price from the beginning of your doing business, to the present with each firm. Or if you manufacture posters or any other form of DESIDERATA yourselves, you are to furnish us with the number sold and the list price of each." (PX-7)

The return receipt for Bell's certified mail #364126 was returned to Bell evidencing delivery of that letter on September 30, 1970, in Kent, Ohio, to one Gary S_____, a person identified during the trial by M. Trikilis as an employee of Pro Arts (PX-7).

21. During the period subsequent to plaintiff Bell's reception of the above-described return receipt (#364126) and June 26, 1971, when this action was filed, defendants, although repeatedly requested to do so,

both by Bell and counsel for Bell, failed to supply requested information as to the sources, quantities and prices of DESIDERATA items obtained by Pro Arts from others, despite repeated statements that such information would be supplied. As indicated in Finding 24, defendants did, ultimately, identify Audio Visual Design of Clinton, Massachusetts, to Bell as one of the Pro Arts sources of DESIDERATA posters, without however, supplying the specifically requested information as to the quantities, dates and prices of such acquisitions and a sample of an Audio Visual Design DESIDERATA poster.

22. More specifically, Bell, having received no response from Pro Arts to his certified letter of September 25, 1970, on October 7, 1970, forwarded another letter to Pro Arts Company (PX-11) at the same address in Kent, Ohio, demanding a response to the certified mail of September 25, 1970, and further demanding " . . . a clear and unequivocal statement as to whether or not you are now or ever have been manufacturers of DESIDERATA in any printed form."

Bell enclosed with this letter a Xerox copy of certified copyright renewal registration #R127100 with respect to DESIDERATA, as obtained by Bertha K. Ehrmann, February 25, 1954 (PX-28).

23. On October 20, 1970, having still received no response from Pro Arts to his letters of September 25 and October 7, 1970, Bell telephoned Pro Arts. The person answering the telephone identified himself as T. Trikilis and said Pro Arts had not been printing DESIDERATA and that he would get back to Bell "by the next week" in response to Bell's demands for information as to the Pro Arts sources of DESIDERATA posters.

24. On November 12, 1970, still having received no response from Pro Arts to his previous letters and telephone call, Bell again telephoned Pro Arts. The person answering again identified himself as Ted Trikilis and said that a Pro Arts source of DESIDERATA had been Audio Visual Design in Clinton, Massachusetts; that Pro Arts was also pursuing Audio

Visual with respect to copyrighted properties of Pro Arts; and that Trikilis would get back to Bell with the number of posters Pro Arts had obtained from Audio Visual.

25. On November 30, 1970, still having no written response from Pro Arts to his previous letters and telephone calls, Bell again telephoned Pro Arts. This time, M. Trikilis answered and promised to get the requested information for Bell, promptly, as to how many DESIDERATA posters had been sold by Pro Arts and their source.

26. On December 21, 1970, still having received no response from Pro Arts, Bell again submitted a written demand to Pro Arts. This time, Bell's letter was addressed to Mike Trikilis, Pro Arts, Inc., 1040 Industrial Parkway, Medina, Ohio 44256 (PX 12). In this letter, Bell recited having called Pro Arts several times and having spoken to both M. Trikilis and T. Trikilis; and further stated that both of them had failed " . . . in every promise you have made to send me information relative to sales of DESIDERATA and to send me a poster manufactured by Audio Visual in

Clinton, Massachusetts." Bell's letter demand of December 21, 1970 further stated:

> "As you know, whether you manufacture or distribute, you are legally responsible for infringement. I have agreed that we will not pursue your firm further provided that we receive a SIGNED NOTARIZED statement as to the number of posters purchased or exchanged with other companies, as well as a statement that you did not manufacture DESIDERATA."

Bell also advised Pro Arts that legal action would follow if the requested affidavit was not promptly received.

27. Thereafter, still having received no written response from Pro Arts, Bell referred the matter to counsel in Cleveland. Counsel for Bell then, through a series of telephone calls and correspondence, first with M. Trikilis and later with former counsel for Pro Arts (PX-13 to 13F, inclusive) continued, unsuccessfully, to encourage M. Trikilis to perform his previous promises to Bell and to counsel for Bell, namely, to supply Bell with an affidavit as to the extent, duration and sources of Pro Arts' previous

sales of, and dealings in, DESIDERATA items. All such efforts failed. On request, former Pro Arts counsel were furnished with documentation as to copyrights covering DESIDERATA and Bell's ownership of certain of such rights, including copies of copyright renewal registration #R127188 of February 25, 1954, with respect to DESIDERATA as a single literary property (PX-2A); the assignment of September 30, 1968, transferring to Bell, among other things, all right, title and interest to the titles, copyrights, plates and inventory of the book The Poems of Max Ehrmann (including DESIDERATA) and other literary works (PX-3E); and an excerpt from Together magazine of June, 1966, explaining the "Found in 1692" myth with respect to DESIDERATA (PX-14) and an offer to supply additional documentation, if requested (see April 19, 1971, letter of Bell's counsel (PX-13F).

28. The instant action was thereafter filed June 26, 1971, in the absence of any response from Pro Arts or its former counsel as to the repeated

requests for information made by or on behalf of Bell during the nine-month period from September 25, 1970 through June 25, 1971 (see plaintiffs' exhibits 11 through 13F, inclusive).

29. Pursuant to a January 25, 1972, pretrial order of Contie, J., Pro Arts supplied an affidavit dated February 15, 1972, admitting that Pro Arts had " . . . purchased and/or sold or distributed . . . approximately three thousand one hundred and ninety-Six (3,196) [posters] . . . incorporating therein a poem entitled 'DESIDERATA' . . . " and that:

> "Affiant says that the reason he is unable to determine the exact amount purchased and/or sold is due to the fact that said [DESIDERATA] posters were purchased from numerous parties including truck jobbers who would arrive at Pro Arts premises at non-scheduled times and trade and/or sell or purchase posters.
>
> "Affiant says further that one of the companies that Pro Arts did purchase these [DESIDERATA] posters from was Audio-Visual Design, Post Office Box 354, Clinton, Massachusetts 01510; that the exact amount of the posters purchased from Audio-Visual Design affiant is unable to determine." (PX-22)

30. One Hundred Twenty Seven (127) Pro Arts invoices (PX-18) show sales by Pro Arts to approximately 90 poster outlets throughout the United States, of at least 1,681 DESIDERATA items (either No. OC 37 DESIDERATA or No. OC 38 DESIDERATA (picture) or both) during the period from May 1970 through June 1971. M. Trikilis also admitted at the trial that Pro Arts had sold an additional 1600 DESIDERATA items of the picture-poster type under two invoices (PX-23 Pro Arts invoice evidencing sale of 1000 No. OC 38 DESIDERATA (picture) items on January 27, 1971; and PX-24 Pro Arts invoice evidencing sale of 600 No. OC 38 DESIDERATA (picture) items on April 21, 1971).

31. Pro Arts invoices show that Pro Arts sold in excess of 2000 DESIDERATA items after receiving written notice under plaintiff Bell's certified mail (#364126) onSeptember 30, 1970, followed by later continuing demands from plaintiff Bell and counsel for Bell for Pro Arts to cease and desist dealing in DESIDERATA items not bearing proper copyright notice.

32. In his deposition, taken in January 1973, more than two years after Bell's written notice of September 25, 1970, to cease and desist, M. Trikilis admitted that in addition to Audio Visual Design of Clinton, Massachusetts, Pro Arts, Inc., may have obtained copies of DESIDERATA items from Specialty Imports in Tennessee; Hip Products in Chicago; Saladin Products in California; and San Francisco Poster Company in various locations. However, in his testimony at the trial, M. Trikilis repeatedly stated he did not know how many such DESIDERATA items Pro Arts may have purchased or traded for with such sources of supply and other unidentified sources of supply, which he knew of, but which he could not identify as to name, location, date, quantities, or prices or values at which Pro Arts had purchased or traded for such DESIDERATA items.

33. M. Trikilis further testified that although he had previously failed, during his deposition, to remember same, he "just remembered" on the morning of the trial that Pro Arts had made several purchases, at unspecified times and on unspecified terms, of

DESIDERATA items "in the hundreds each time" from an organization he then identified as Steffen & Gaines in Sausalito, California. Neither M. Trikilis nor T. Trikilis, although requested to do so, could produce any records, other than the invoices referred to in Finding 30, as to the amounts, dates, times, places, quantities, prices, and sources of DESIDERATA items purchased or traded for by Pro Arts. Although Pro Arts admitted printing its own 1970 catalog (PX-21) and its own advertising flyer (PX-20) each of which contained one or more reproductions of DESIDERATA, Pro Arts denied it had ever printed or produced any DESIDERATA items, utilizing its own production facilities.

34. Pro Arts admitted its 127 invoices, which evidenced sales of DESIDERATA items (PX-18), showed that the orders for such sales were obtained by or credited to 13 different salesmen, including T. Trikilis. Pro Arts further admitted that at no time were any Pro Arts' salesmen given instructions to cease and desist selling or otherwise dealing in DESIDERATA items.

35. M. Trikilis admitted that he gave the following testimony in his deposition:

Q. When you sold DESIDERATA, you always sold them under the OC37 stock number?

A. Not necessarily. I believe we had variations. The poster came in three or four different ways.

Q. The DESIDERATA poster came in three or four different ways?

A. Correct.

Q. All right. What other different ways?

A. One was on parchment.

Q. Okay.

A. One was just on paper.

Q. Yes.

A. One was with a picture of a lake or something like that. And I think one was on a scroll. There may be even more variations, but we didn't list them all. We just put down one. Whatever we happened to have at the time was what we probably shipped.

36. The evidence has shown that the poster making, selling, distributing and trading business,

in effect, is a rough and tumble business, participated in by many transient operators, some of whom Pro Arts dealt and traded with, without even knowning their names. In effect, some poster makers, traders, and distributors were seen once, and then never seen again. Others were more established. In effect, record keeping in the poster exchange and trading business is informal and sometimes non-existent, as when quantities of posters at one value are traded for lesser or greater quantities of posters at a different value.

E. Damages

37. Pro Arts did not submit evidence of its costs with respect to its acquisition of DESIDERATA items for sale to, or exchange with, others.

38. Plantiffs' actual damages are not readily ascertainable because (1) Pro Arts did not know how many DESIDERATA items it had sold or exchanged in total. Hence, Bell had no means of establishing his loss of royalties occasioned by sales and exchanges of DESIDERATA items by Pro Arts as an unlicensed seller, or his further losses arising from being deprived of an undisclosed number of opportunities to

sell his own renditions of DESIDERATA as manufactured and offered for sale by Crescendo Publishing Company (See PX-1); and (2) by selling DESIDERATA items in the form advertisied and shown by Pro Arts as No. OC-37 bearing the words, "Found in Old Saint Paul's Church; dated 1692", Pro Arts aided in the perpetuation of the myth that DESIDERATA was in the public domain, due to alleged ancient orgins; and (3) by selling DESIDERATA items in the form shown by Pro Arts as No. OC38, depicting a placid beach or water scene with the full text of DESIDERATA shown below--whether such posters carried the notation "(c) 1968 American Newsrepeat Co., 243 Collins St., San Francisco, California 94118," or not--Pro Arts aided in the perpetuation of other myths, i.e. that DESIDERATA had been copyrighted by American Newsrepeat Company or that DESIDERATA itself is not copyrighted.

F. Plaintiffs' Efforts to Police its Copyright Rights Relative to DESIDERATA

39. As of March 5, 1973, Bell had, in addition to the present action, instituted four other lawsuits charging many others with infringements of DESIDERATA:

licensed six prior infringers upon payment of royalties for past infringements; settled with five infringers who had paid damages; and had licensed ten other organizations to utilize DESIDERATA in variously defined ways and forms.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter, under 28 USCA § 1338, and of the parties.

2. The economic philosophy behind the power of Congress to grant copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare in that field. Mazer v. Stein, 347 US 201, 219 (1954).

3. Under the U. S. Copyright Act, any copy of a copyrighted article" . . . made or sold or found in the possession of the infringer . . . "after notice, is a separate infringement (17 USC § 101). With respect to infringements occurring before or without notice, innocence of intention to infringe is no defense. See Shapiro, Bernstein & Co., Inc. v.

H. L. Green Co., Inc., 316 F.2d 304, 308 (2d Cir. 1963).

4. This copyright action would not have been necessary, but for the repeated failures of defendants to supply Bell, as copyright proprietor of DESIDERATA, with facts, figures, and samples of the infringing DESIDERATA posters. Although such information was repeatedly promised by defendants, they, for whatever reason, failed to supply it to Bell and thereby deprived Bell of the data he needed, properly to protect and defend his copyright rights to DESIDERATA.

5. Defendants M. Trikilis and T. Trikilis are, respectively, the president and vice president of Pro Arts. They are, between them, the owners of 80% of the stock of that fast-growing company, whose estimated gross revenues have risen from approximately $350,000. in 1969 to approximately $1,200,000. in 1973. Both of them have been actively engaged in the general operation of Pro Arts since its inception. Nevertheless, both these defendants repeatedly testified, "I don't know", or the equivalent, with respect to relevant

matters such as, but not limited to, the total number, the prices and the sources of infringing DESIDERATA posters which Pro Arts had admittedly purchased or traded for, both before and after actual notice of plaintiff Bell's copyright rights with respect to DESIDERATA. On the record made in this case, such matters were, or should have been, peculiarly within the knowledge of such defendants. This Court has, therefore, taken into account, in the formulation of its Conclusions of Law, that through no fault of Bell and through no lack of diligent inquiry by him, both before and during the trial, these defendants have, for whatever reason, impeded plaintiffs from obtaining prompt and accurate information as to the infringing activities of Pro Arts and others.

6. Defendants, in explanation of their collective lack of records as to their purchases and trades made to obtain infringing DESIDERATA posters and their failure to supply plaintiffs with samples of same, described the poster youth novelty business in which they were engaged, in effect, as a "rough

and tumble" business, subject to informal operating procedures.

The law does not countenance such circumstances or explanations as somehow excusing disregard of the property rights of others. Cf. City Loan and Savings Co. v. Employers' Liability Assurance Corp., 249 F. Supp. 633, 657 (N.D.Ohio 1964); aff'd., 356 F.2d 941 (6th Cir. 1966).

7. Plaintiff Bell is now the proprietor of residual author's copyright rights to DESIDERATA as found in Findings 5, 11 and 13. Plaintiff Cuarta is now the proprietor of residual publishing copyright rights to the book entitled, The Poems of Max Ehrmann (including DESIDERATA), as found in Findings 9, 11, 14 and 15.

8. On September 25, 1970, when plaintiff Bell directed a letter by certified mail (#364126) to Pro Arts in Kent, Ohio, demanding that Pro Arts cease and desist utilizing DESIDERATA and further demanding information as to the source and quantity of DESIDERATA items then maintained by Pro Arts, plaintiff Bell had

the right and duty to proceed as he did.

9. The evidence is conclusive that on September 25, 1970, plaintiff Bell mailed, by certified mail, a cease and desist demand to Pro Arts. The requested return receipt for that letter (#364126), moreover, demonstrates that the letter had been delivered to an admitted employee of Pro Arts at Kent, Ohio (P.O. Box 287) on September 30, 1970 (PX-7).

Defendants M. Trikilis and T. Trikilis, however, deny that plaintiff Bell's letter demand of September 25, 1970, was seen by them or brought to their attention. This dispute raises a question of agency. Whether the authority of the party who signed the return receipt (#364126) on behalf of Pro Arts, in Kent, Ohio, on September 30, 1970, was express, implied or apparent, the result is the same. Since the party who signed the receipt was an employee of Pro Arts, it follows that whether that employee did or did not bring the certified letter to the attention of the president or vice president of Pro Arts, plaintiff Bell had done all he could do to notify Pro Arts; and the

fault, if fault there was in bringing the letter to the officers of Pro Arts, is the fault of Pro Arts for which Pro Arts, and not Bell, is responsible. 2 Ohio Jr. 2d, Agency § 91. Otherwise, the anomalous and unacceptable situation would arise whereunder any corporate addressee could avoid the effect of the receipt of certified mail merely by denying, not that the letter was delivered to the corporation, but rather by denying only that the letter was brought to the attention of an appropriate representative of the corporation. The Court concludes, therefore, that Pro Arts did receive written notice to cease and desist utilizing DESIDERATA in any unauthorized manner on September 30, 1970. In addition, the evidence is undisputed that Pro Arts, at or about the time of the receipt of Bell's letter of December 21, 1970 (PX-12), had ample notice of Bell's rights with respect to DESIDERATA.

10. The evidence as to continued infringements of DESIDERATA by defendants, after notice, is clear with respect to the sale of more than 2000 DESIDERATA posters by Pro Arts, as shown by copies of its invoices

which are in evidence. What is not clear in the evidence is the total number of DESIDERATA articles that were sold, purchased, or traded for by defendants, both before and after written notice from plaintiff Bell.

11. The Court concludes that plaintiffs' damages are not readily ascertainable. This is so, regardless of the actual number of DESIDERATA articles sold by defendants, over and above the more than 2000 copies sold after notice. It is clear that each of the DESIDERATA items sold and/or traded by defendants, both before and after notice, damaged Bell in at least one of the following three ways:

(A) Posters bearing the mythical notation, "Found in Old Saint Paul's Church; dated 1692" perpetuated the myth that DESIDERATA was in the public domain and was not copyrighted.

(b) Beach scene posters containing the full text of DESIDERATA and bearing a misleading indication of non-applicable copyright by American Newsrepeat Co. of San Francisco stated or perpetuated a different myth that American

Newsrepeat Co., and not plaintiffs, was the proprietor of a copyright to DESIDERATA.

(C) Beach scene posters containing the full text of DESIDERATA, but having no bottom margin (as shown in item No. OC38 in the 1970 Pro Arts catalog) and therefore showing no notice of copyright whatsoever, denied plaintiffs' copyright rights by inferring no such copyright rights existed.

12. 17 USCA § 101 provides, in effect, that where actual damages to the copyright proprietor and/or profits accruing to the infringer, as a result of infringing conduct, are not ascertainable with accuracy or precision, as here, the trial court has discretionary authority to award damages in lieu of actual damages up to and including $5000.

It has long been the rule in this District, as decided in Sebring Pottery Co. v. Steubenville Pottery Co., 9 F.Supp. 384 (N.D. Ohio 1934), that with respect to such statutory "in lieu" damages:

" . . . where the damages are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive for the injuries caused by the infringer is committed to the discretion of the trial judge." (9 F.Supp. at 389)

13. In view of the circumstances disclosed by the testimony and by the exhibits, the Court finds defendants Pro Arts, Inc., Michael P. Trikilis and Theodore N. Trikilis to be jointly and severally liable as infringers of the valid copyrights of plaintiffs. The Court awards to plaintiffs damages in lieu of actual damages in the amount of Five Thousand Dollars ($5,000.).

14. Under appropriate circumstances, punitive or exemplary damages may be awarded in copyright actions. See e.g., Nash v. Alaska Airlines, Inc., 94 F.Suppl. 428 (S.D. N.Y. 1950). This Court cannot say the circumstances of this case necessitate or require the imposition of punitive damages. Accordingly, no such damages are awarded.

15. 17 USC § 116 authorizes the allowance of full costs and attorneys' fees to the prevailing party

in a copyright action. Full costs and reasonable attorneys' fees should be awarded to plaintiffs.

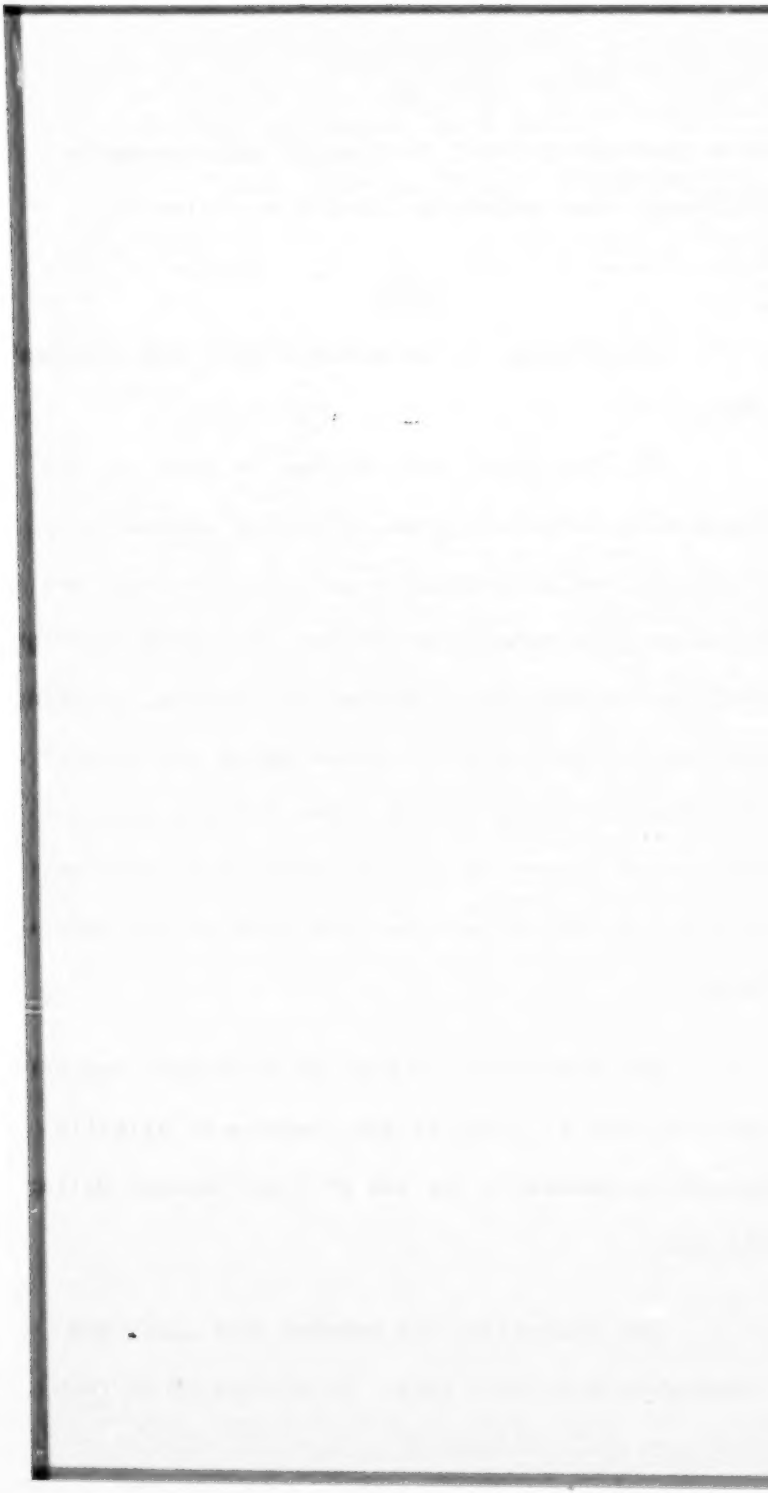
ORDER

Accordingly, it is hereby ordered and adjudged that:

(1) Pro Arts, Inc., Michael P. Trikilis and Theodore N. Trikilis, alone or through agents, distributors, and all others in privity with them, are permanently enjoined from further infringing copyrights #R127188 and #A28266 by dealing in, copying, printing, selling, possessing or otherwise making any further use of DESIDERATA or any of the other literary works of Max Ehrmann covered by the aforementioned copyrights, without the express written permission of the copyright owners.

(2) Plaintiffs recover of defendants Pro Arts, Inc., Michael P. Trikilis and Theodore N. Trikilis jointly or severally the sum of Five Thousand Dollars ($5,000.).

(3) Plaintiffs are awarded full costs and reasonable attorney's fees. Determination of such



attorney's fees are deferred until submission by plaintiffs' attorney of an affidavit setting forth the time and effort alloted to this case together with a reasonable hourly rate. Defendants may file specific objections to the attorney's fees requested by plaintiffs' attorney in his affidavit.

IT IS SO ORDERED.

/s/ Frank J. Battisti
Chief Judge

PROOF OF SERVICE

Copy of the foregoing mailed by regular U.S. mail this 5th day of May, 1975, to:

William S. Burton, Attorney for Appellee, 1144 Union Commerce Building, Cleveland, Ohio 44115.

Roger R. Ingraham
Attorney for Appellants
Pro Arts, Inc.

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Supreme Court of the United States

October Term, 1974
No. 74-1412

PRO ARTS, INC., *et al.*,
Petitioners,

vs.

ROBERT L. BELL, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Statute

United States Copyright Act:

17 U.S.C. Sec. 101 ..... 2, 3
17 U.S.C. Sec. 101(b) 2

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BRIEF OF RESPONDENTS IN OPPOSITION

This is an action for copyright infringement.

The petition presents no ground for review by certiorari.

There is no claim that the decision below is in conflict with the decision of another Court of Appeals.

The issues are factual—whether, as Pro Arts contends, the copyrighted work, a poem styled DESIDERATA, is in the public domain and whether the damages assessed were excessive.

OPINIONS BELOW

The opinion of Chief Judge Frank J. Battisti (N.D. Ohio E.D.) is reported in 366 F. Supp. 474 and is reproduced in petitioners' Appendix B, pp. 10-46.

The opinion of the United States Court of Appeals for the Sixth Circuit (Phillips, Chief Judge, Miller, Circuit Judge and DeMascio, District Judge) is reported in 511 F.2d 451 and is reproduced in petitioners' Appendix A, pp. 7-10.

STATUTE INVOLVED

The United States Copyright Act, 17 U.S.C. §101, provides in pertinent part:

"§101 *Infringement*

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States [as here] such person shall be liable:

* * * * *

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement . . . or *in lieu** of actual damages and profits, such damages as to the court appear to be just, and in assessing such damages the court may, in its discretion, allow the amount hereinafter stated . . . and such damages shall in no case exceed the sum of $5,000, nor be less than the sum of $250, and shall not be regarded as a penalty."

QUESTIONS PRESENTED

The questions Pro Arts seeks to raise are:

1. Whether respondent Bell's copyright is valid and infringed;

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*Emphasis supplied throughout.

2. Whether the trial court correctly allowed damages in the sum of $5,000, pursuant to the discretionary authority granted by statute.

STATEMENT OF THE CASE

Findings by the two courts below, which Pro Arts has not challenged, show that despite repeated demands, Pro Arts continued to infringe (Findings of Fact 20-36, petitioners' Appendix B, pp. 22-34).

Unchallenged findings by the two courts below also show that Bell diligently policed his copyright (Findings of Fact 5 and 39, petitioners' Appendix B, pp. 12-13 and 35-36).

Pro Arts continued to infringe after written notice to cease and desist with respect to the sale of more than 2,000 infringing posters containing the text of DESIDERATA. The *total* number of infringements, however, was far greater. Pro Arts kept no records as to the additional number, prices or sources of infringing posters which it admittedly purchased or traded (Conclusions of Law 5 and 10, petitioners' Appendix B, pp. 37-38 and 41-42).

Both courts below found that since Bell's damages were not readily ascertainable*, statutorily prescribed *in lieu* damages of $5,000 should be awarded (Conclusions of Law 11-13, petitioners' Appendix B, pp. 42-44).

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*See Court of Appeals affirming opinion "It is apparent that appellant's damages were not readily ascertainable. The failure of appellant to cooperate during pretrial discovery made it impossible to ascertain damages. Where actual damages are unascertainable, the court may award damages within the limits prescribed by 17 U.S.C. §101. The award by the district court here did not exceed those limits" (Petitioners' Appendix A, pp. 9-10).

ARGUMENT

I. Petitioners do not challenge the validity of respondents' copyright rights with respect to DESIDERATA.

Pro Arts did not, in the court below, challenge the validity of the copyright. It cannot do so now.

Stuff v. E. C. Publications (1965), 342 F.2d 143, on which Pro Arts relies, is inapplicable. There, the copyright failed because its owner ". . . had been most derelict in preventing others from infringing his copyright" (342 F.2d at 145).

Here the unchallenged Finding is that:

> "39. As of March 5, 1973, Bell [respondent] had, in addition to the present action, instituted four other lawsuits charging many others with infringements of DESIDERATA: licensed six prior infringers upon payment of royalties for past infringements; settled with five infringers who had paid damages; and had licensed ten other organizations to utilize DESIDERATA in variously defined ways and forms." (Finding of Fact 39, petitioners' Appendix B, pp. 35-36).

The diligence shown here, but wanting in *Stuff*, would make that case inapplicable even if this issue had been raised in the courts below—as it was not.

II. Pro Arts would challenge the award of $5,000 in lieu damages, as excessive.

The trial court was fully authorized, in its discretion, to award statutory *"in lieu"* damages, and to do so in the sum of $5,000.

This Court speaking through Mr. Justice Roberts held, in *Douglas v. Cunningham* (1934), 294 U.S. 207 at 210:

> "The trial judge may allow such [*in lieu*] damages as he deems to be just and may, in the case of an infringement such as is here shown, in his discretion, use as the measure of damages one dollar for each copy,—Congress declaring, however, that just damages, even for the circulation of a single copy, cannot be less than $250 and no matter how many copies are made cannot be more than $5,000.
>
> * * * * *
>
> The employment of the statutory yardstick, within set limits, is committed *solely* to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute."

Judge Augustus Hand put the matter this way in *Hartfield v. Peterson* (2d Cir. 1937), 91 F.2d 998 at 1001:

> "The appellants [as here] further contend that the award of $5,000 fixed by the District Court as statutory damages is too high. But we have no power to deal with such an objection when we find [as here] the copyright valid and infringed. The power to allow such damages *in lieu* of actual damages is, so far as it is exercised, within the limits of the statute,

a matter wholly for the trial court which we have no right to review."

CONCLUSION

No ground to disturb the findings, concurred in by the two courts below, having been shown, Certiorari should be denied.

Respectfully submitted,

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June 5, 1975